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ABSTRACT

The primary focus of this legal education module, fourth of five to be integrated into an 11th grade American history course, is on the problems of maintaining a system of government in which officials who make, change, enforce, and apply laws do not unreasonably interfere with fundamental values and interests of the governed. Understandings, or objectives, consider how officials may interfere with basic interests of citizens in the processes of governing; look at the United States Constitution to identify principles that limit powers of officials for protection of the governed; and examine mechanisms by which offical conformity to principles of the Constitution may be monitored. The format of this module follows that described for Module I, SO 007 673. (Author/KSM)

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TEACHING ABOUT BASIC LEGAL CONCEPTS IN THE SENIOR HIGH SCHOOL

MODULE IV-THE SYSTEM: KEEPING OFFICIALS IN LINE

SP 007 670

The University of the State of New York/The State Education Department
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MODULE IV-THE SYSTEM: KEEPING THE OFFICIALS IN LINE

1. *The Main Focus.*

If government is to serve the people, control of officials is of fundamental importance, for when society creates a government, officials are put into positions of power where they may do harm as well as good. This module focuses on the problems of maintaining a system of government in which officials who make, change, enforce, the apply laws do not unreasonable interfere with fundamental values and interests of the governed. The mechanisms studied in this module may also be used to insure that officials perform their jobs effectively. It is necessary to protect citizens from official action when officials move beyond the limits of official duty. It is also necessary to insure that officials fulfill the duties of their offices. Law attempts to insure that officials do an adequate job without assuming too much power.

If such fundamental interests of citizens are to be protected, then there must be laws that define official action. Such laws are frequently found in the written constitutions of legal systems. Although the focus of this module is on constitutional law, definition and limitation of official power of officials is not only specified in written constitutions. Statutes and other laws also significantly define and limit official power.

Limiting laws alone are not enough to guarantee that legal officials will not interfere with fundamental values of the governed. There must also be mechanisms within the legal system that allow for surveillance of official compliance with such limiting law. This module treats the following questions which are of central importance to a free society:

(1) Why do legal officials sometimes violate constituted limits?
(2) What basic values of a free citizenry are vulnerable to official interference?
(3) What mechanisms can a system use to control officials?
(4) What conditions are necessary for the effectiveness of these mechanisms?
(5) What roles must private citizens play?

2. *Why This Focus?*

There are four reasons why a module for high school social studies should consider the significance of law as a means of monitoring and controlling the activities of legal officials. First, to study how the work of officials may be subjected to legal controls is also to study how officials may be induced to discharge their official duties properly. These duties include the making and administering of laws governing the daily lives of citizens, laws which usually benefit citizens. When law itself is used to improve the discharge of official duties, this furthers the fundamental purpose of law, to improve the quality of the daily life of the citizen.

Second, when officials get out of line, they not only fail to discharge their duties and deprive the citizens of the positive benefits of law, they may, in overstepping legal bonds, also interfere with other basic values such as freedom of speech and democratic rule. To study ways of controlling officials is also to study how such basic values may be protected from official interference. The fact that many of these values are specically vulnerable to official interference makes this study even more important.

Third, the various ways and means of controlling officials through law are also the ways and means of securing a "government of laws" as opposed to a "government of men." For, without means of keeping officials in bounds, one would surely have a government of men in which citizens would be subject to the arbitrary whims of their rulers. A system that subjects its rulers as well as its citizens to law accepts what is sometimes called "constitutionalism." This module gives students an opportunity to study constitutionalism, through study of the U.S. Constitution, in a context in which students can see just what limitation constitutionalism involves.

Fourth, in order for legal controls on officials to be effective, private citizens must be willing to perform important roles. Accordingly, citizens must know what these roles are, and understand how their performance is important to effective control of officials. Most fundamental of all, citizens must *care* about whether officials do their duties. This module cannot make students care, but it can inform them of the possible consequences if they do not care.

Module 4

3. *Outline of the Teaching Scheme:*

This module on the function of law in controlling officials contains five understandings. The first understanding considers how officials may interfere with basic interests of citizens in the processes of governing. The second understanding looks at the United States Constitution to identify principles that limit powers of officials for protection of the governed. The next three understandings examine mechanisms by which official conformity to principles of the Constitution may be monitored:

(1) checks by officials within the same branch
(2) checks and balances between different official branches
(3) an independent judiciary
(4) free expression
(5) the vote

The final understanding considers the importance of education in preparing citizens for the critical roles they must play if government is to serve the people.

For each instance, there are many historical examples in which the various types of monitoring have been used. Teachers using this module as part of an American History course may wish to identify these, and include them in student research and discussion assignments.

Some examples include:

- Alien and Sedition Acts controversy
- Impeachment of Andrew Johnson
- Scandals of the Grant administration
- Canal Ring
- Tweed Case
- Woodrow Wilson and the Versailles Treaty controversy
- Teapot Dome
- Franklin Roosevelt and "the packing of the Supreme Court"
- Truman's firing of General MacArthur
- Censure of Joseph McCarthy
- Censure of Adam Clayton Powell
- Resignation of Spiro Agnew

SUMMARY OF UNDERSTANDINGS

I. IN THE PROCESS OF GOVERNING, OFFICIALS MAY INTERFERE WITH BASIC RIGHTS AND VALUES OF CITIZENS.

II. THE CONSTITUTION SETS THE BOUNDARIES OF THE FORM OF GOVERNMENT, THE SCOPE OF OFFICIAL POWER, AND THE OPERATIONAL PROCESSES OF OFFICIALS IN ORDER TO PROMOTE THE INTERESTS AND PROTECT THE RIGHTS OF CITIZENS.

III. MONITORING OF OFFICIAL COMPLIANCE WITH CONSTITUTIONAL BOUNDARIES MAY BE PROVIDED BY INTERNAL CHECKS ON OFFICIALS AND BY CHECKS AND BALANCES AMONG DIFFERENT BRANCHES OF GOVERNMENT.

IV. EXTERNAL CHECKS ON OFFICIAL COMPLIANCE WITH CONSTITUTIONAL BOUNDARIES MAY BE PROVIDED BY A NUMBER OF MEANS:
- AN INDEPENDENT JUDICIAL BRANCH ACTIVATED BY PRIVATE CITIZENS.
- CITIZEN'S EXERCISE OF FREE EXPRESSION.
- THE NECESSITY OF AN OFFICIAL TO STAND FOR ELECTION AT REGULAR INTERVALS.

V. THE IMPORTANCE OF THE ROLE OF THE PRIVATE CITIZEN IN PROVIDING CHECKS ON OFFICIALS REQUIRES THAT CITIZENS BE KNOWLEDGEABLE ABOUT FUNDAMENTAL RIGHTS AND CONCERNED ABOUT PROTECTING THOSE RIGHTS.

UNDERSTANDING I

IN THE PROCESS OF GOVERNING, GOVERNMENT OFFICIALS MAY INTERFERE WITH BASIC RIGHTS AND VALUES OF CITIZENS.

A. *Explanation of Understanding I*

The creation of government which puts men in official positions with power to control individuals for the common good also restricts individual freedom and creates potential for disregard of basic individual interests. The most effective and efficient methods of government are sometimes the most threatening to basic individual interests and freedoms. Government officials might be more efficient if they were not impaired by minority rights, if they were able to suppress all criticism of themselves by the governed, if

they didn't have to bother with cumbersome rights of the accused when maintaining order and prosecuting criminals, or if government powers were centralized in one or a few officials who made, changed, enforced, and applied all law. Thus, there is a basic conflict in organized government; efficiency is not always compatible with the protection of the basic interests of individuals.

B. *Teaching Understanding I*

OBJECTIVES

- Given a description of the actions of an official in detaining or arresting a suspect, the student can classify each official action in terms of effect upon the suspect's individual rights and reasons why society would accept or reject that action.
- The student can review a television presentation or a film depicting official detention of a suspect in terms of the degree to which government officials interfere with basic rights and values of citizens.

QUESTIONS TO REACH UNDERSTANDING

- How might officials encroach on fundamental interests of citizens in the process of governing?
- Why might officials encroach on fundamental interests of citizens in the process of governing?

DETAILED DESCRIPTION OF STRATEGIES

(a) Have the class view one or more of the following motion pictures:

- "President's Power Contested" (Relates to 1952 seizure of the steel mills by President Truman.)
- "Equality Under Law — The Lost Generation of Prince Edward County" (Schools in violation of the Constitution.)
- "Due Process of Law Denied" (Unfair trials in the Old West.)
- "Keystone for Education" (Religion in the public schools.)

(See resource section for additional information.)

All of these films depict official interference with the basic rights and interests of the government.

The following questions should be posed for discussion after film viewing:

- What was the basic value with which the official was interfering?
- To what extent did the interference result from what the official did as contrasted with how he did it.
- Why did the official take the questionable action?

DISCUSSION OF STRATEGIES AND RESOURCES

Two basic strategies are presented. One is based on viewing one or more films; the second is based on reading one or more court decisions. The teacher may decide to use either or both strategies to develop the understanding. Two inquiries should provide focus in reaching this understanding: What basic value is threatened by the official action in point? Why did the official interfere with the value?

After study of one or two appropriate cases students will see situations in which officials, acting in what they took to be the line of duty, nonetheless infringed upon basic values of our legal system. This study may accomplish two things.

First, from these cases students may discover that some basic values are vulnerable to interference by government. Government may venture into some subject areas (regulating religious or other beliefs) where its very presence is oppressive. Government may operate in a fashion that is offensive to notions of fundamental fairness to the individual (legislating without regard to a basic democratic value of letting those affected have some representative voice in the matter).

Second, students may come to understand that when government improperly interferes with basic individual freedoms or interests, the problem is not usually a matter of corruption or dishonesty. Often, when officials violate fundamental interests of the people, it is merely a manifestation of the officials attempting to do their jobs in an efficient manner. Another important explanation for

DETAILED DESCRIPTION OF STRATEGIES

(b) Divide the class into several teams of students. Have each team read one of the following court decisions:

- Youngstown Sheet and Tube Company v. Sawyer (Relates to the 1952 seizure of the steel mills.)
- Rochin v. California (An instance of forced stomach pumping of a narcotics suspect.)
- School District v. Schempp (Bible reading in schools.)

Students in each team should determine the following with regard to the case assigned to their team.

- Questions posed for film viewing may be applied here.

Have students exchange their findings and attempt to formulate some generalizations based on both reading and discussion.

(c) Based on class activities related to this understanding and previous student knowledge, have students compile a list of reasons why a government official might want to take questionable actions which might interfere with basic rights and interests of the citizens.

DISCUSSION OF STRATEGIES AND RESOURCES

official nonadherence to limiting constitutional law has to do with the nature of some of the limiting constitutional principles themselves. The exact boundaries of these principles are not always easy to identify. It is possible that some such principles are and should be a bit vague or "open ended," clearly identifying the spirit of their command, but leaving their details to be worked out in concrete cases over time. One of America's most familiar constitutional principles provides an example: the United States Constitution requires "due process" in specifying how criminal suspects are to be apprehended, questioned, and tried. While the spirit of due process is easily identified, a significant part of American judicial history has been spent refining the boundaries of this limiting principle. In view of the nature of some constitutional limiting principles, the source of much official nonadherence is intelligent official misjudgment.

Possible reasons for such questionable actions include:

- corruption
- misjudgment
- desire for efficient operation of government
- dislike of particular citizen
- undefined limits of the right violated

RESOURCES*

Films:

"President's Power Contested." McGraw-Hill Films. 28 min.

The 1952 steel seizure and the resulting court action are described in detail for what they tell about the power of the President and its limits.

"Equality Under Law—The Lost Generation of Prince Edward County." Encyclopedia Britannica Films.

Schools in violation of the Constitution. A pamphlet, *The Prince Edward County Case*, is available from EBF. In addition to a transcript of the decision, it contains a review of separate versus integrated education in the United States.

"Due Process of Law Denied." Twentieth Century Fox Films. 29 min.

From "Oxbow Incident"; unfair trials in the early West.

"Keystone for Education." Educational Communications Associates, Inc.

Religion in the public schools.

Court Cases:

School District of Abbington v. Schempp, 374 U.S. Reports, 203 (1963).

Bible reading in schools violates basic interests in separation of church and state. Violates the provision for no "establishment" of religion. See resource section for Understanding VI, Module III for sources.

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. Reports, 579 (1952).

Takeover of the nation's steelmills by presidential order to avert a strike violates the basic interest of the people in having only their elected legislative representatives legislate—the interest of the people in having a voice in what the laws will be. Violates constitutional provision that all legislative power is vested in Congress.

*Direct quotations from statutes are indicated by the use of quotation marks. Other statements are summaries or paraphrases of the statute listed.

An edited version of this decision is contained in:

Commager, H.S., ed. *Documents of American history*, 8th ed. New York. Appleton-Century-Crofts. 1968. Vol. II, Doc. No. 598, pp. 577-581.

Konvitz, M.R. *Bill of Rights reader: leading constitutional cases*, 4th ed. Ithaca. Cornell University Press. pp. 5ff.

Swisher, C.B. *Historic decisions of the Supreme Court*. Princeton, N.J. Van Nostrand Company. pp. 165-169.

Tresolini, Rocco. *Constitutional decisions in American government*. New York. Macmillan Company. pp. 85-97.

Rochin v. California, 342 U.S. Reports, 165 (1952).

"MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

"Having 'some information that [the petitioner here] was selling narcotics,' three deputy sheriffs of the County of Los Angeles,...made for the two-story dwelling house in which Rochin lived with his mother, common-law wife, brothers and sisters. Finding the outside door open, they entered and then forced open the door to Rochin's room on the second floor. Inside they found petitioner sitting partly dressed on the side of the bed, upon which his wife was lying. On a 'night stand' beside the bed the deputies spied two capsules. When asked 'Whose stuff is this?' Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers 'jumped upon him' and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This 'stomach pumping' produced vomiting. In the vomited matter were found two capsules which proved to contain morphine.

"Rochin was brought to trial before a California Superior Court, sitting without a jury, on the charge of possessing 'a preparation of morphine' in violation of the California Health and Safety Code...Rochin was convicted and sentenced to sixty days' imprisonment. The chief evidence against him was the two capsules. They were admitted over petitioner's objection, although the means of obtaining them was frankly set forth in the testimony by one of the deputies, substantially as here narrated.

"On appeal, the District Court of Appeal affirmed the conviction, despite the finding that the officers 'were guilty of unlawfully breaking into and entering defendant's room and were guilty of unlawfully assaulting and battering defendant while in the room,' and 'were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant in the alleged hospital.' ...

"...Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those cannons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' ... These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' ...

"...The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions. ...

"...we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation. ...

"Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.' ... It would be a stultification of the responsibility which the course of constitutional history has cast upon this court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.

"To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their

unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society. ...

"On the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause. The judgment below must be

"Reversed."

Miscellaneous

"Toward Greater Fairness for All." *Time magazine*. February 26, 1973. Vol. 101, No. 9, pp. 95-96.

Explores impact of recent court interpretations of "due process of law" in protecting the rights of the individual and limiting administrators and officials in exercising certain arbitrary powers (to forclose, to expel, to coerce, etc.).

UNDERSTANDING II

THE CONSTITUTION SETS THE BOUNDARIES OF THE FORM OF GOVERNMENT, THE SCOPE OF OFFICIAL POWER, AND THE OPERATIONAL PROCESSES OF OFFICIALS IN ORDER TO PROMOTE THE INTERESTS AND PROTECT THE RIGHTS OF CITIZENS.

A. *Explanation of Understanding II*

The importance of limiting officials in order to protect basic individual values and interests against potentially oppressive government illustrates a vital function of a written constitution. Constitutions contain limiting laws that set forth the boundaries of legitimate official action.

The fact that an official infringes upon a basic value does not necessarily imply that he is exceeding a law, for there may be no limiting law on the subject. Thus, a legal system concerned with controlling its officials must identify limits of official activities. Once identified, these limits can be formulated into some sort of constitutional limiting law.

It seems likely that when the proper boundaries of official action are defined in law, diligent officials will try to stay within those bounds. The drawing of the limits is the first mechanism for controlling officials. Such boundaries may also define the duties of the official so he will be more likely to fulfill his prescribed role.

B. *Teaching Understanding II*

OBJECTIVES

- The student can demonstrate understanding of the limiting powers of a constitution or charter by indicating specific ways in which a particular constitution affect the operational process of government.
- Given a charter or a constitution to analyze in terms of limitation of power, the student can propose an appropriate analysis model and apply it to the document in question.

QUESTIONS TO REACH UNDERSTANDING

- How does a written constitution control officials?
- Why is such control important?

Module 4

DETAILED DESCRIPTION OF STRATEGIES

The following activities may be used by small group study teams with a general discussion and information exchange to follow.

1. Certain constitutional provisions limit the form of government.

   (1a) Examine provisions of a constitution which provides limitations in terms of the *person* who can perform particular official tasks of government, to identify limits on the *form of government*.
   Examples: U.S. Constitution, Article I, Section 1; Article II, Section 1; Article III, Section 1.

   Key questions:

   - Who can perform? What is the nature of the official tasks?
   - What limits on the form of government can be identified?

2. Certain constitutional provisions limit the scope of official power.

   (1a) Examine provisions of a constitution that limit the subjects about which laws can be made with a view to identifying limits on the *scope of government*.
   Examples: U.S. Constitution, Article I, Section 8; Article I, Section 9; Amendment I.

   Key questions:

   - What are some examples of hypothetical laws which would be forbidden by the Constitution?

DISCUSSION OF STRATEGIES AND RESOURCES

To reach Understanding II, it is suggested that students examine familiar constitutional provisions of the state, Federal, or school constitution. However, it is also suggested that they do this from a functional perspective. Constitutions not only structure governments, they also limit governments as to form, scope, and operational processes. By identifying boundaries for the "who," "what," and "how" of government, constitutions provide protection of basic individual rights and interests against the government. By identifying these boundaries, students may develop understanding of the functional importance of a sound constitution for maintaining good government in a society that is concerned with basic freedoms of citizens.

1. Certain constitutional provisions limit the form of government. Illustrations from the U.S. Constitution:
   - Article I, Section 1
     (all legislative power vested in Congress)
   - Article II, Section 1
     (all executive power vested in President)
   - Article III, Section 1
     (all judicial power vested in Supreme Court and inferior courts as Congress creates)

2. Certain constitutional provisions limit the scope of official power. Illustrations from the U.S. Constitution:
   - Article I, Section 8
     (no suspension of Habeas Corpus
   - Article I, Section 9
     (no Bills of Attainder or ex post facto laws)
   - Amendment I
     (no laws restricting free religion, speech, press, assembly, or petition)

DETAILED DESCRIPTION OF STRATEGIES

- How do the constitutional provisions which have been examined limit the scope of government?

3. Certain constitutional provisions limit the operational processes of officials.

(3a) Examine provisions of a constitution that limit how official activity can be carried out by identifying the limits on *the processes officials can use* to perform their duties.
Examples: U.S. Constitution, Amendment IV; Amendment V; Amendment VI, Amendment VII.

Key question:

- What restrictions are imposed on the processes which officials can use in performing their duties?

(b) Have students analyze the school student body constitution, using the same questions used in analyzing the segments of the U.S. Constitution, or modified questions which the students propose as more appropriate.

Other constitutions and charters may be approached in the same way. Some students may wish to draw up a model for analyzing the limitations imposed by a constitution or charter.

(c) Using the Bill of Rights of the U.S. Constitution, compare the constitution of one or more developing nations. What basic differences can be discovered? What accounts for any differences?

DISCUSSION OF STRATEGIES AND RESOURCES

3. Certain constitutional provisions limit the operational processes of officials. Illustrations from the U.S. Constitution:
- Amendment IV
  (restriction of search and arrest procedures)
- Amendments V and VI
  (restriction on procedures of criminal prosecutions)
- Amendment VIII
  (restriction on punishment procedures)

The framers of the Bill of Rights in the 18th century were preoccupied with concerns of what government might do to them. People in developing nations may be very concerned with what government can do for them.

DETAILED DESCRIPTION OF STRATEGIES

DISCUSSION OF STRATEGIES AND RESOURCES

(d) In studying the Federal Constitution, using some of the readings suggested in the resource section or American history texts, the following questions may be useful:

- What factors shaped the framing of the Constitution?
- What are the three basic parts of the Constitution?
- Since the Bill of Rights dealt with the relationship of the citizen to Federal government, could a state deny these rights to citizens of that state? Explain. (Study the content of Amendment XIV and investigate the circumstances of its enactment.)

(e) Other activities to highlight the meaning of the various articles of the Bill of Rights may include:

- Constructing a series of posters or pictures illustrating the rights secured by the first eight amendments to the Constitution.
- A "charades format" in which students on each charades team try to identify the right derived from one of the articles in the Bill of Rights, or a statement related to one of these rights.

RESOURCES*

Materials for Teacher Use

McIlwain, C.H. *Constitutionalism: ancient and modern.* Ithaca. Cornell University Press. Great Seal Books. 1958.

Defines constitutionalism and traces its history from the classical era through the present. Concludes with a consideration of modern constitutionalism and its problems. Originally six lectures delivered in 1938-39.

Sartori, Giovanni. "Constitutionalism: A Preliminary Discussion." *American political science review.* Vol. LVI, No. 4, December 1962.

Corwin, E.S. & Peltason, J.W. *Understanding the constitution.* New York. W. Sloane Associates. 1949.

Explanation in nontechnical terms of each article of the Constitution, section by section.

Materials for Student Use

Barth, Alan. *Heritage of liberty.* New York. Webster Division, McGraw-Hill Book Company. 1965.

See Chapter 1, "The Fundamentals of Freedom."

Crabtree, A.P. *You and the law.* New York. Holt, Rinehart and Winston, Inc. 1964.

A citizen's handbook to the law. Several chapter titles — "Negotiable Instruments," "Buying and Selling," "Mortgages," "Landlord and Tenent," — indicate the emphasis and philosophy. Chapter 16, "You and the Constitution," deals largely with the Bill of Rights.

Kottineyer, W. *Our Constitution and what it means,* 3d ed. New York. Webster Division, McGraw-Hill Book Company. 1965. (4th ed., 1970).

*Direct quotations from statutes are indicated by the use of quotation marks. Other statements are summaries or paraphrases of the statute listed.

Module 4

Younger Lawyers Committee of the Federal Bar Association. *These unalienable rights: a handbook of the Bill of Rights for high school students.* Foundation of the Federal Bar Association. 1965. (With teachers guide: "A Bill of Rights Program Guide.")

Individual chapters deal with the amendments constituting the Bill of Rights; subsections discuss basic rights. Commentary well grounded in key court decisions. Selected bibliography.

UNDERSTANDING III

MONITORING OF OFFICIAL COMPLIANCE WITH CONSTITUTIONAL BOUNDARIES MAY BE PROVIDED BY INTERNAL CHECKS ON OFFICIALS, AND BY CHECKS AND BALANCES AMONG DIFFERENT BRANCHES OF GOVERNMENT.

A. *Explanation of Understanding III*

The existence of constituted boundaries of legitimate official action is important in maintaining a free society. But establishment of such limits in a constitution does not necessarily secure officials conformity to them. Officials may disregard constituted limiting law for diverse reasons. A viable system of governement in a free society needs mechanisms through which official conformity to constitutional principles can be monitored.

There are several important mechanisms for policing official conformity to constitutional principles. The surveillance mechanism whereby officials of the same type may check on each other is considered first in this understanding. Through such internal controls as informal criticisms, formal review, and sanctions, administrators check on administrators, judges check on judges, and legislators check on legislators.

In addition, our government is constituted in such a way that officials of one branch can check on abuse of power by officials of another branch. Materials on the operation and theory of balance of power are abundant in secondary social studies curriculum. This understanding attempts to put these materials in context as <u>one</u> of the various mechanisms for monitoring official compliance with limiting constitutional principles.

B. *Teaching Understanding III*

OBJECTIVES

- The student can list several ways in which the structure of a government, local, state, or Federal, monitor compliance with constitutional boundaries, and can compare the effectiveness of each of these ways by citing examples.

Module 4

QUESTIONS TO REACH UNDERSTANDING

- How are the actions of officials regularly reviewed by similar officials?
- How are the actions of officials sometimes sanctioned by similar officials?
- Why was our government constituted in separate branches?
- How does the checks and balances scheme illustrate the conflict between the need for an efficient government and the need to limit the power of government officials?
- Can the system of checks and balances be abused?

Module 4

DETAILED DESCRIPTION OF STRATEGIES

1. Informal criticism of officials by like officials may keep an official in line.

   (1a) Have students gather clippings from current magazines and newspapers which illustrate the informal criticism of officals by like officials. For example, the New York State Comptroller, an administrator, may criticize spending plans of the Governor, also an administrator. These clippings may then be grouped in terms of types of authority represented or by level of government (local, state, national). On the basis of the evidence presented in the clippings, students may be able to propose for subsequent testing hypothesis concerning frequency of use of this technique at any level of authority or government. An alternative classification and hypothesis-formation exercise could involve the apparent effectiveness of this technique as a check on authority.

2. Officials review the decisions of like officials.

   (2a) One aspect of this mechanism is the review by administrators of other administrators' decisions. Use several case studies derived from excerpts from decisions reported in

DISCUSSION OF STRATEGIES AND RESOURCES

1. Officials criticize like officials. In a healthy legal system, officials will share a feeling of responsibility to conform to limiting constitutional principles. Where this is so, officials may feel an informal public obligation to criticize improper activity of fellow officials. A leading contemporary legal philosopher, H. L. A. Hart, states that a feeling of responsibility and willingness to criticize is a "... minimum condition necessary and sufficient for the existence of a legal system"

2. Officials review the decisions of like officials. For each division of government, there are two separate formal mechanisms of internal surveillance for the officials. The first is the provision for review of official action. If an administrative official has violated the limits of constitutional law, there may be provision for appeal to higher administrative officials to review the initial administrator's decision or activity. In a bicameral legislature, separate houses serve to check one another, for a bill must pass both houses. If one has disregarded constitutional limits, the other has the power to withhold necessary approval. One ground for an appeal of a court decision to a higher court is that the lower court judge has disregarded constitutional limits.

3. Officials sanction like officials. The second formal internal check of officials on like officials is sanctions. If an administrator disregards the limits of his power he may be removed from office by other administrators. Legislators may censure their fellow legislators whose acts are inconsistent

New York State Education Reports. These will serve as case studies of an administrator reviewing administrators' actions. The following cases are suggested:

- In the Matter of Lilliam E. Cossey
- In the Matter of Tinmel
- In the Matter of James

(see p. 29 for the above cases.)

After hearing or studying reports concerning each case, students may comment concerning the nature of the surveillance mechanism illustrated by these cases, and its probable effectiveness.

Each school district annually receives a copy of New York State Education Department Reports which contains recent Commissioner's decisions. If the teacher is able to obtain access to this set, he may draw other cases for additional individual or small group studies.

The teacher may find it useful to read Itzhak Zamir's article, "Administrative Control of Administrative Action," in vol. 57 of the California Law Review, pp. 860-905.

with constitutional limits. For disregarding basic legal limits, judges may be removed by special courts made up of judges.

4. Monitoring through checks and balances. Materials currently in use may provide the teacher with procedures and resources. A case study of the judicial check on the executive or legislature may be of interest. The operation of an independent judiciary as activated by concerned private citizens is considered in greater detail as an "external check" in Understanding IV.

The teacher may find it useful to read Chapter 16, "Checks Within the Judicial Bureaucracy," in Murphy and Pritchett, Courts, Judges, and Politics.

One dimension of this mechanism is the sanction of an administrator by an administrator.

Items from several sources dealing with the same event might be combined as a case study. The removal of a cabinet officer by the President is an example that could be treated in this manner.

A classic example of the sanction of a legislator by his colleagues was the Senate censure of Senator Joseph McCarthy after his activities in the 1950s. Some students may wish to read portions of Seymour Mandelbaum's The Social Setting of Intolerance to determine the conduct of Senator McCarthy that led to the sanction of censure. The Congressional Record of December 2, 1954, contains the Senate sanction, (see p. 26).

DETAILED DESCRIPTION OF STRATEGIES

(2b) Another aspect of this same mechanism is illustrated by a legislator's review of the actions of other legislators. Have students read Article I of the United States Constitution or Article III, Sections 7-9 of the State Constitution which provide for setting up a bicameral legislature to determine why a bicameral legislature would limit official power.

Students may then examine excerpts from a debate by the House of Representatives in which the constitutionality of proposed legislation is an issue and the bill in question has already been passed by the Senate. The resource section contains excerpts from the Congressional Record, taken from the House debate on the 1970 Voting Rights Amendment after the bill had passed the Senate. Pose these or similar questions:

- How does this situation illustrate how a bicameral legislature limits official power?
- How is the debate an example of officials revising other officials' actions?

(2c) A third aspect of the same mechanism is a judge's review of the work of other judges. Using any of the court

DISCUSSION OF STRATEGIES AND RESOURCES

Excerpts from newspapers and other media of that period are contained in American Civilization in Historic Perspective, Part I, pp. 91-117.

Another example of this mechanism which students could read about is the House denial of his seat to Adam Clayton Powell for the misuse of funds, disregard of court processes, and failure to cooperate with a House Committee. This is contained in the Congressional Record of Feb. 28, 1967, (see p. 27).

Currently, the allegations growing out of the Watergate breakin in June 1972 will seem relevant to this topic. At any point in discussion of this topic, or a related current issue, it is important for students to differentiate between allegations and statements of opinion, on the one hand, and proven charges on the other.

DETAILED DESCRIPTION OF STRATEGIES

DISCUSSION OF STRATEGIES AND RESOURCES

cases suggested for use with previous understandings, have students consider the following:

- Why are the cases termed appellate cases? (In discussion, these are cases which are reviews of decisions made by lower court judges.)
- How does the process of review limit official power?

3. Officials sanction like officials.

(3a) Have students examine cases of the removal from office or censure of any Federal, state, local, or school administrative official by another administrative official. Students may collect examples from current news sources which show the censure or removal of such an official.

Have students determine the causes and the function of the sanction.

(3b) The class may examine any removal from office of a Federal, state, or local legislative official by other legislative officials. Have students determine the causes and the function of the sanction.

(3c) Have students obtain information on the removal from office or censure of any Federal, state, or

local judge by another judge, determining the causes and the function served by the sanction. As part of this strategy, have students read and discuss the relevant passage from the New York State Constitution (Article VI, Section 22) entitled "Removal for Cause or Forced Retirement of Judge or Justice; Court on the Judiciary."

Have some students read an edited version of Matter of Vorhees v. Kopler dealing with the removal of a judge for collecting debts with a gun. (see p. 38). Others may read Matter of Sarisohn related to the removal of a judge for assorted irregular and prejudicial activity. Conduct a class discussion of the causes and function of the sanction in both cases.

Overview of Strategies

Separate work teams may focus attention upon the check of one division on each of the other branches. In the case of the "judicial team," the two dimensions, judicial review of an executive decision and judicial review of a legislative decision, should be included.

1. The executive check serves to review official legislative and judicial activity.

   Reference: Federalist Papers, numbers 48 and 51.

DETAILED DESCRIPTION OF STRATEGIES

2. The legislative check serves to review official executive and judicial activity.

   Reference: United States Constitution

3. The judicial check serves to review official executive and legislative activity.

   (a) Have study Group C investigate judicial review of an executive decision. The group can examine one or more case studies showing the judiciary serving as a check on violation of limiting constitutional principles of the executive branch of government. Suggested cases include:

   - Youngstown Sheet and Tube Co. v. Sawyer (See resource section Understanding I, Module IV.)
   - Rochin v. California (See resource section for Understanding I, Module IV.)
   - Monroe v. Pape

   Cases that might serve as a case study for judicial review of a legislative decision:

   - School District of Abbington v. Schempp (See resource section for Understanding VIII, Module III.)
   - Engel v. Vitale (See resource section for Understanding VIII, Module III.)

DISCUSSION OF STRATEGIES AND RESOURCES

A New York State case which shows how the legislative check of the executive may be distorted and misused can be found on page . If the teacher wishes to use this as an individual case study or a class project, the following questions are suggested:

- What made it possible for the orderly processes of government to have been so completely thwarted at the whim of a political leader who was not even an elected office holder?
- Could such capriciousness occur today? At the local level? State? National?
- What could have motivated men of such generally high character as Alfred E. Smith and Robert F. Wagner, Sr. to play pivotal roles in this murky drama? Can you think of other similar paradoxes involving other well known and highly regarded public figures?
- Why does a "cause celebre" like this Sulzer case vanish so quickly from the public mind?

DETAILED DESCRIPTION OF STRATEGIES

DISCUSSION OF STRATEGIES AND RESOURCES

(b) Have study groups rotate the materials as each works through all four phases of this exploration of the functioning of checks and balances. A followup discussion will help assure full development of this understanding.

As an alternative, have each group persue a thorough investigation of just one dimension of the system of checks and balances. After an indepth study of each team, move to a follow-up fishbowl for a full exchange of information and ideas. The teacher should insure that the understanding is fully realized.

RESOURCES*

Materials Related to Officials Sanctioning the Actions of Like Officials

Mandelbaum, S.J. *The social setting of intolerance: the know-nothings, the red scare, and McCarthyism.* Scott Foresman Problems in American History Series.[1] Chicago. Scott, Foresman. 1964.

Unit Three, "McCarthyism," pp. 117-176 is organized as five "problems" based on readings which consist of articles, speeches and transcripts of testimony by McCarthy, his supporters, and his opposition.

[1] Same series as James, The Supreme Court in American Life.

Congressional Record, Vol. 100, Part 12, page 16392. (83d Congress, 2d Session, December 2, 1954; Senate Resolution no. 301, Senate sanction of Senator Joseph McCarthy after his 1950's witch hunts.)

"The result was announced--YEAS-67; NAYS-22; NOT VOTING-6; ANSWERED "PRESENT"-1 - McCarthy

"So the resolution (S. Res. 301), as amended, was agreed to, as follows:

"*Resolved*, That the Senator from Wisconsin, MR. MCCARTHY, failed to cooperate with the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration in clearing up matters referred to that subcommittee which concerned his conduct as a Senator and affected the honor of the Senate and, instead, repeatedly abused the subcommittee and its members who were trying to carry out assigned duties thereby obstructing the constitutional processes of the Senate, and that this conduct of the Senator from Wisconsin, MR. MCCARTHY, is contrary to senatorial traditions and is hereby condemned.

"SEC. 2. The Senator from Wisconsin, MR. MCCARTHY, in writing to the chairman of the Select Committee To Study Censure Charges (MR. WATKINS) after the select committee had issued its report and before the report was presented to the Senate charging three members of the select committee with 'deliberate deception' and 'fraud' for failure to disqualify themselves; in stating to the press on November 4, 1954, and the special Senate session that was to begin November 8, 1954, was a 'lynch party'; in repeatedly describing this special Senate session as a 'lynch bee' in a nationwide television and radio show on

*Direct quotations from statutes are indicated by the use of quotation marks. Other statements are summaries or paraphrases of the statute listed.

November 7, 1954; in stating to the public press on November 13, 1954, that the chairman of the select committee (MR. WATKINS) was guilty of 'the most unusual, most cowardly thing I've heard of' and stating further: 'I expected he would be afraid to answer the questions, but didn't think he'd be stupid enough to make a public statement'; and in characterizing the said committee as the 'unwitting handmaiden,' 'involuntary agent,' and 'attorneys in fact' of the Communist Party and in charging that the said committee in writing its report 'imitated Communist methods—that it distorted, misrepresented, and omitted in its effort to manufacture a plausible rationalization' in support of its recommendations to the Senate, which characterizations and charges were contained in a statement released to the press and inserted in the CONGRESSIONAL RECORD of November 10, 1954, acted contrary to senatorial ethics and tended to bring the Senate into dishonor and disrepute, to obstruct the constitutional processes of the Senate, and to impair its dignity; and such conduct is hereby condemned."

Congressional Record, Vol. 113, Part 4, page 4774. (90th Congress, 1st Session, February 28, 1967; House Resolution No. 278; House denial of seat of Adam Clayton Powell for misuse of funds, disregard of court process, and failure to cooperate with a House committee.)

"DENYING MR. POWELL HIS SEAT... .

"MR. LONG of Maryland. Mr. Speaker, the report of MR. CELLER'S select committee to investigate ADAM CLAYTON POWELL does not satisfy me as being sufficiently strong, and tomorrow I shall propose an amendment to House Resolution 278 which would deny MR. POWELL his seat. My reasons for doing so are sixfold, and I should like to enumerate them at this time.

"First, the fine to be imposed on MR. POWELL is an insufficient deterrent because it deals with only part of the sums involved in the charges of misconduct. ...

"Second, the $40,000 fine, to be imposed in monthly installments of $1,000, is based on the assumption that MR. POWELL will be reelected in 1968. ...

"Third, there is a possibility that MR. POWELL will appeal to the courts on the ground that a fine cannot be imposed for any reason other than absenteeism, and the courts could declare the fine unconstitutional.

"Fourth, the seriousness of MR. POWELL'S offenses raises the possibility that he may yet go to prison on criminal charges. The sentencing of a Member of Congress to prison would reflect on the integrity and honor of every other Member, just as the behavior of MR. POWELL has aroused indiscriminate public indignation against all of his colleagues.

"Fifth, the argument that MR. POWELL'S constituents will return him to Congress is not persuasive. Now that the committee has found him guilty, his constituents might decide they want a higher level of representation. In the event he were returned, the moral responsibility would be on his constituents, not on Congress. Furthermore, there is a possibility that the State of New York will determine that MR. POWELL does not qualify as an inhabitant of New York, and thus does not fulfill residency requirements for election to Congress and is ineligible to run for reelection.

"Last, Mr. Powell has demonstrated himself totally unworthy of membership in the Congress of the United States, and I am opposed to our seating him.

"Mr. Speaker, I include the text of my amendment to House Resolution 278 at this point in the RECORD. ...

"'That Adam Clayton Powell, Representative-elect from the State of New York, ought not to have or hold a seat in the House of Representatives, and the seat to which he was elected is hereby declared vacant.' ...

"'Whereas the Select Committee appointed Pursuant to H. Res. 1 (90th Congress) has reached the following conclusions:

"'First, Adam Clayton Powell has repeatedly ignored the processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct towards the court of that State has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

"'Second, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964 to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D.C. or the State of New York as required by law.

"'Third, as chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper use of expenditures of government funds for private purposes.

"'Fourth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in their lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member;... .'"

New York State Constitution, Article VI, Section 22 - Removal for Cause or Forced Retirement of Judge or Justice; Court on the Judiciary.

(Use New York State Redbook or the Legislative Manual for this reference.)

Materials Related to Officials Reviewing the Decisions of Like Officials

In the Matter of Lillian E. Cossey, Vol. 9 New York State Education Department Reports, p. 11, (1969). (Commissioner revises the decision of a local Board of Education and holds that a dress code prepared with student and parent help cannot be enforced if the length of a boy's hair does not endanger health or safety.)

"Nyquist, Acting Commissioner.—In September 1968, petitioner's son, Daniel Cossey, entered Linton High School in Schenectady as a tenth grade student. A series of discussions concerning his status took place throughout the fall semester, culminating in his suspension on January 7, 1969. The reason given for the suspension was that the boy's hair was worn in a manner which violates Linton High School's dress code. Following a further discussion, it was agreed that the boy would transfer to Mont Pleasant High School, which has no such code.

"...The sole issue in this case, which is the first to come before me involving a regulation arrived at with the participation of students and parents as well as faculty and administrators, is whether the code is enforceable by disciplinary action against a student who fails to adhere to it. ...

"Commissioners of Education have held repeatedly that that matter of a student's appearance may not be regulated by administrative order where fashion or taste is the sole criterion. Regulations must relate to a specific educational purpose, such as health, safety or full participation in various activities. ...

"...I hold that, since this dress code is concerned solely with questions of taste, its provisions are not enforceable by disciplinary action against a student who fails to abide by them.

"...I find that the suspension was unlawful and that the transfer was made under a misapprehension. Daniel Cossey is entitled to be reinstated at Linton High School. ..."

In the Matter of Turmel, Vol. 9, New York State Education Department Reports, p. 193, (1970) (Commissioner upholds decision of local Board of Education that a teacher be refused a day of personal leave with pay to attend a Vietnam Moratorium.)

"Nyquist, Commissioner.—Petitioner, a teacher in respondent's district, requested respondent to grant him a day of personal leave with pay...in order to participate in the Vietnam Moratorium Day held on October 15, 1969. Respondent denied petitioner's request and informed him that his absence on that day for such purpose would be considered personal leave without pay. Petitioner was absent from school on that day and respondent deducted from his pay one day's salary. Petitioner seeks payment of that one day's salary.

"It is petitioner's contention that respondent's action impinged upon his right of freedom of expression. ...

"I cannot agree with petitioner that an expression of his political beliefs could not have been made at a time when his school was not in session. If petitioner's contention were accepted and teachers were considered to have an unrestricted right to personal leave with pay at any time they felt a desire to express their political convictions, school authorities could, in the event that several teachers sought to exercise that privilege simultaneously, be in a position in which they could not operate their schools at that particular time. Such a situation should not and cannot be allowed to exist. ...

"In petitioner's brief he raises...the argument that the expression of his personal conscience is a matter of religion and that his participation in the Vietnam Moratorium Day was a religious holiday for which purpose personal leave is provided. I find that argument to be totally without merit.

"I find that the expression by school district employees of their political views is not business of such nature that it cannot be conducted at a time when school is not in session. The refusal by respondent to grant petitioner's request for a day of personal leave with pay to participate in the October 15, 1969 Vietnam Moratorium Day and its action deducting one day's pay from his salary for his absence on that day was reasonable and should not be reversed."

In the Matter of James, Vol. 10, New York State Education Department Reports, (1970). (Commissioner upholds decision of local Board of Education that a teacher can be dismissed for wearing a black armband to protest the Vietnam War.)

"Nyquist, Commissioner.—Petitioner, a probationary teacher of English at Addison Central High School in respondent's district, was suspended by respondent for wearing a black armband in class on November 14, 1969, a Vietnam Moratorium Day. Thereafter, he was informed by respondent that he could return to his teaching duties with the understanding that he 'engage in no political activity while in the school.' On December 12, 1969, another Vietnam Moratorium Day, petitioner again wore a black armband to class. As a result of this action, petitioner was suspended on that day and, on January 13, 1970, was dismissed in accordance with the provisions of Education Law §3013(1). The pertinent part of that subdivision reads as follows:

> "Teachers...shall be appointed...for a probationary period of not to exceed five years...Services of a person so appointed...may be discontinued at any time during such probationary period, upon the recommendation of the district superintendent, by a majority vote of the board of education... .

"Commissioner of Education, as well as the courts, have consistently held that such probationary teachers have no vested rights to be continued in their positions and that the services of a probationary teacher may be discontinued without a hearing and without giving or explaining the reasons for such action.

> "...it may well be that a teacher with satisfactory technical qualifications might have certain personal characteristics and attitudes that would prevent him from acting in harmony with his associates and fitting into the requirements of a particular school. In such a case the judgment and discretion of the board, made up of men and women of standing and experience, are most valuable safeguards in the selection of a permanent teaching staff for carrying on the work of the school. ...

"The essence of the appeal, however, rests in petitioner's claim that his dismissal was in violation of his constitutional rights.

"Petitioner alleges that, by wearing a black armband, he was exercising his right of free speech under the First Amendment to the United States Constitution and contends that, by dismissing him, respondent has violated this constitutional right. Petitioner seeks an order

reinstating him to his former position with back pay from the date of his dismissal and directing respondent not to suspend or dismiss him in the future without just cause shown.

"Respondent alleges that the wearing of the black armband in class was a political act expounding to the students only one side of a controversial issue and, as such, constituted an unethical practice by a member of the teaching profession. Respondent further alleges that, by wearing a black armband a second time, despite a reasonable direction by respondent not to do so, petitioner was guilty of insubordination. For these reasons respondent contends that its dismissal of petitioner was justified. ...

"...The real issue before me then concerns the right of a schoolteacher in class to wear a black armband,, which is expressive, though only symbolically, of a specific viewpoint. ...

"It is a matter of fundamental educational policy that whatever subject of instruction may be involved, the teacher must present the entire range of information available in relation to such subject. If the subject matter involves conflicting opinions, theories or school of thought, the teacher must present a fair summary of the entire range of opinion so that the student may have complete access to all facets and phases of the subject. Petitioner in this case, in wearing the black armband in his classroom, was presenting only one point of view on an important public issue on which a wide range of deeply held opinion and conviction exists. ...

"The wearing of the black armband has been declared to be symbolic speech, i.e., 'closely akin to "pure speech"' and 'the type of symbolic act that is within the freedom of speech provision of the First Amendment' (Tinker, supra). It follows that such symbolic speech, in the classroom, is a form of teaching and is subject to the strictures of sound pedagogy. ...

"Since the actions of appellant were contrary to sound education principles, and since those actions were not constitutionally protected in the circumstances of this appeal, the action of the respondent in terminating appellant's probationary appointment must be sustained.

"The appeal is dismissed."

Zamir, Itzhak. "Administrative Control of Administrative Action." *California law review.* Vol. 57. 1969. pp. 866-905.

United States Constitution, Article I. (Constitutional provision establishing a bicameral legislature.)

Debate: Congressional Record, Vol. 116, No. 100, page 20159ff. (91st Congress, 2d Session, June 17, 1970; remarks of Representative Matsunga and Representative Celler.)

This debate was related to the 1970 Voting Rights Amendment (provided for the 18-year-old vote in state and Federal elections) after the bill had passed the Senate. The bill ultimately passed the House and was challenged in the courts as unconstitutional. The Supreme Court determined that as to state elections it was unconstitutional.

"EXTENDING VOTING RIGHTS ACT OF 1965

"MR. MATSUNAGA. Mr. Speaker, by direction of the Committee on Rules, I call up House Resolution 914 and ask for its immediate consideration.

"The Clerk read the resolution as follows:

"H. Res. 914

"*Resolved*, That, immediately upon the adoption of this resolution, the bill (H.R. 4249) to extend the Voting Rights Act of 1965 with respect to the discriminatory use of tests and devices, with Senate amendments hereto, be, and the same hereby is, taken from the Speaker's table, to the end that the Senate amendments are, and the same are hereby, agreed to.

"The SPEAKER. The gentleman from Hawaii is recognized... .

"MR. MATSUNAGA. ... Mr. Speaker, House Resolution 914 presents a very simple issue to this House; that is, whether or not we should agree to the Senate amendments to H.R. 4249, a bill to extend the Voting Rights Act of 1965.

"The basic and real question, however, is whether or not the Voting Rights Act of 1965 should be extended beyond its present statutory life. If we fail to adopt House Resolution 914 today it will mean the demise of the Voting Rights Act of 1965 on August 6, 1970. ...

"Generally speaking, the Senate amendments in fact improve upon the House bill. Even a constitutional authority such as the gentleman from Virginia (MR. POFF) testified before the Rules Committee that the Senate amendments do in fact improve the House bill.

"There is only one difficult question posed by the Senate amendments, that involving the extension of voting rights to citizens 18, 19, and 20 years of age. The principal objection is based on the contention that the amendment runs contra to our Federal Constitution. It is said that as Members of Congress we took the oath upon accepting the responsibilities of our office that we would uphold the Constitution of the United States and that a favorable vote for this particular amendment would be tantamount to a violation of that oath. I, too, Mr. Speaker, took that oath and have no intentions of violating it. I am convinced, just as firmly as those who hold the opposite view, that the 18-year-old enfranchising amendment is fully within the power of Congress to enact without violating the provisions of the Constitution.

"The Supreme Court recognized this congressional power in the case of Katzenbach against Morgan in 1966 when it upheld a provision of the Voting Rights Act of 1965 which banned literacy tests as voting qualifications. This power could constitutionally be extended to lower the voting age to 18.

"Two of the Nation's leading constitutional authorities hold this view and so do dozens of other experts on constitutional law. ...

"As in any other question of constitutionality, sincere and well-intentioned minds can and will differ on this issue. The Supreme Court is duly disignated by the Constitution as the final arbiter on questions of constitutionality. Let us, therefore, carry out our responsibilities as Members of Congress and legislate as we deem proper and let the Court decide whether or not we acted beyond our constitutional authority. Let us do now what we think is right.

"Speaking now on the merits of the issue, Mr. Speaker, I think the minimum age requirement of 21 years is both arbitrary and archaic. The use of '21' as an indication of adulthood and maturity originated during the medieval times when it was generally believed that a male at 21 was old enough for literally bearing the weight of arms and armor. While we have revised the age for bearing arms to 18, we have kept the age for voting at 21. Surely, this discrimination was not intended by Congress. It is noteworthy in this connection that approximately one-half of Americans killed in combat in Vietnam fall within the age group 18 to 21.

"With the knowledge explosion of recent years working in his behalf, the young person of 18 today is just as fully qualified to vote as a person of 21 was when the age minimum was set. Our youngsters today are much more sophisticated in political matters than we were at their age. I am confident that the 18 year olds of today will make as intelligent voters as did 21 year olds a decade ago.

"Furthermore, by extending the right to vote to our 18-, 19-, and 20-year-olds, we would be showing visible recognition of the national crisis in confidence in our institutions and system among our youth. We would be encouraging and strengthening the position of those who want to work within the system rather than against it. ...

"MR. MATSUNAGA. Mr. Speaker, I yield to the distinguished chairman of the Committee on the Judiciary, the gentleman from New York (MR. CELLER) ...

"MR. CELLER. Mr. Speaker, the Voting Rights Act of 1965 has made it possible for over 1 million blacks to register to vote and has made it possible for approximately 500 blacks to attain elective office. ...

"Finally I want to point out to you my good friends that a vote against ordering the previous question is tantamount to a vote against the extension of the Voting Rights Act.

"If there is any change in the bill, the bill then goes to conference and there, I can assure you, there would be the death knell of the bill.

"Why do I say that? I say that because of my knowledge of what would happen in the other body. I know who the conferees would be. If this bill goes back to the other body, then this bill is as dead as that flightless bird called the dodo.

"Over in the other body whether it be in the committee or on the floor—the gentlemen there would temporize, hinder, saunter, oppilate, prolong, prorogue, protract, procrastinate, and in other words, they would filibuster.

"Mr. Speaker, the act expires 7 weeks from now. That is a short time—and an ideal time within which certain gentlemen could indeed filibuster.

"The bill would be like the ferocious bull that goes into the arena. The bull goes in alive, all right—but we know that as a result of the work of the matador and the picador and the toreador that the bull does not come out of the ring alive.

"The bill will go in alive, but it will come out dead. If you feel that the Voting Rights Act is a good bill, and it has proved its effectiveness, you must vote in favor of ordering the previous question on the pending resolution.

"Now I am not alarmed at the rider of the voting age reduction provision on this Voting Rights Act. Court decisions can be cited for or against its constitutionality. On this question I am confident, however. The statutory voting age reduction provision will meet an early court challenge this year. It will receive a full and complete review by the Supreme Court before the end of the year and a final judicial determination will occur before the 1971 elections. ...

"Mr. Speaker, H.R. 4249, the voting rights extension bill, as amended by the House, was approved on December 11, 1969. The bill then was amended and approved by the other body on April 2 of this year. On April 8 I asked unanimous consent to take the bill from the Speaker's table with the Senate amendments. That unanimous-consent request was objected to. On the same day I wrote to the chairman of the Committee on Rules requesting that that committee grant a rule of the type embodied in House Resolution 914, and also requested a hearing before that committee at the earliest convenient date.

"It may help if I attempt briefly to set out the major provisions of the Senate version of the bill. First, in two areas the Senate amendments closely parallel provisions approved by the House. These are:

"First, a nationwide ban on literacy tests and similar devices. ...

"Second, establishment of a uniform ceiling on residency requirements imposed by the States for voting for President and Vice President of the United States. ...

"The Senate version of H.R. 4249 also contains three provisions not contained in the bill which the House approved last December. These are as follows:

"An extension of all of the provisions of the Voting Rights Act of 1965 for an additional 5-year period. ...

"A supplemental trigger provision which extends the remedies of the Voting Rights Act to additional areas of the country based on 1968 election results. This may bring within the coverage of the Voting Rights Act of 1965 certain counties in New York State—Bronx, Kings and Manhattan—as well as counties in California, Idaho, and elsewhere.

"Finally, the Senate version would reduce the minimum voting age to 18 in all Federal, State and local elections.

"Mr. Speaker, I have said on the floor before, and I repeat again, that my paramount interest lies in the simple and prompt extension of all of the provisions of the Voting Rights Act of 1965. The records of our subcommittee hearings, Civil Rights Commission reports and the history of litigation over the past 5 years all testify to the substantial progress thus far achieved under the act as well as the fragility of that progress. ...

"I have also expressed my qualms and personal misgivings about a statutory reduction in the voting age. Unlike many Members, I do hold doubts as to the wisdom of extending the franchise to persons 18 to 21. Of course, I recognize that many Members of the Congress do not share these qualms. I respect their differences of opinion.

"I also hold reservations about the constitutional authority of Congress to statutorily amend voting age requirements in State and local, as well as Federal elections. I am not confident that the provisions in the Constitution in article I, section 2; article II, section 1; the 17th amendment; or the 14th amendment empower the Congress to lower or raise the age qualification of voters in State, local, or Federal elections. Nor do I find decisions of the Supreme Court that hold or intimate that the Congress, by legislative fiat, may declare nationwide voting age requirements.

"I do not read the decision of the Court in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), to squarely support congressional enfranchisement of persons below the voting age established by the States.

"Despite these reservations and concerns, to which, as you know, I have given vent recently, I am now, today, firmly and finally of the opinion that we must brook no obstacle to the immediate extension of the Voting Rights Act of 1965. That extension is of such paramount national importance that it must be effectuated as promptly as possible and at a minimum of risk. ...

"Mr. Speaker, I am convinced that the provisions of the Senate amendment can be subjected to prompt and thorough court challenge. I am also persuaded that a final court decision on the validity of the statutory voting age reduction will be rendered in advance of primary and local elections occurring in 1971 to avoid calamity and chaos in our electoral process.

"Suit could be instituted directly in the Supreme Court. A State could bring a suit against the Attorney General who is given the powers of enforcement under the Act--original jurisdiction is founded under article III, section 2, South Carolina against Katzenbach.

"A suit also could be brought in a lower Federal court by a potential voter under 21 who is denied registration; or a voter over 21 if those under 21 are granted registration. In either case a three-judge court would be convened with direct appeal to the Supreme Court. ...

"In short, I believe that the national interest will best be served if the House promptly accepts the Senate amendments. I urge my colleagues to approve House Resolution 914 to permit House concurrence in the Senate Amendments to H.R. 4249. ...

Murphy, W.F. & Pritchett, C.H. *Courts, judges and politics: an introduction to the judicial process.* New York. Random House. 1961.

A collection of essays and cases "which analyze and illustrate the functioning of the judiciary in the context of the American political process." Considers the policy significance of what judges do. Chapter 16, "Checks within the Judicial Bureaucracy," is pertinent to this understanding.

Matter of Voorhees v. Kopler, 239 Appellate Division Reports, 83 (1933) (Judge removed for collecting debts with gun.)

"...The record presented to us shows the following facts, largely derived from the testimony of respondent himself: Petitioner Voorhees had drawn and delivered to one Colburn a post-dated check in payment for some syrup. The check was not paid on its due date, was not even presented at the bank where it was payable, and the transaction was in process of discussion and adjustment. Colburn went to repondent's place of business...and told respondent that Ray Voorhees had given him a bad check. Respondent answered that he could issue a warrant but would be willing to go up and see Voorhees and 'see if we can fix it.' Respondent admitted that he did not see the check or know the amount or date of it or whether it had been put in the bank or not. On the way to petititioner's residence, in the evening of the same day, respondent put the check in his pocket without looking at it. Respondent then had a revolver on his person. A wordy altercation ensued at petitioner's home at the time of the visit of Colburn and respondent, during which, as respondent testified, 'I pulled the gun and I am proud of it and I don't deny it.' Colburn testified that as a result of what happened there on the evening in question, Colburn collected his money and that that was what he took

respondent there with him for. He further stated that respondent had done other collection work for him and that he had paid respondent for it, no stated amounts, but whatever he thought was right. ...

"With this definition in mind, the recital of what occurred at petitioner's home on the evening in question and the testimony of respondent and Colburn as to respondent's motives and practices show this to be a case where cause for removal has been shown. A justice of the peace receives his emoluments solely in the form of specified fees...for items of judicial service. The list does not include collection of accounts for creditors. This record shows that not only on the occasion in question but as a matter of custom respondent acted as a collector of debts owing, that he was often paid for so doing, and that he utilized his position as justice of the peace on such occasions as an added stimulus to favorable reaction on the part of delinquent debtors. Respondent must have realized this to be extra-official, as it was. Then...respondent saw fit to take a firearm with him on his trip as bill collector and to draw it from his pocket in the course of the controversy which his visit brought about. This, too, was outside of the scope of respondent's judicial prerogatives.

"The prayer of the petitioner should be granted and the respondent removed from his office as justice of the peace.

"All concur.

"Petition granted and respondent removed from his office as justice of the peace."

Matter of Sarisohn, 29 Appellate Division Reports, Second Series 91, (1967) (Judge removed for assorted irregular, prejudicial activity.)

"Motion by respondent, in a proceeding to remove him from office, to strike and dismiss certain allegations of the statement of charges. ...

"*Per Curiam.* This is a proceeding...to remove respondent, a Judge of the District Court of Suffolk County, from office for cause. The respondent moves to strike and dismiss paragraphs First, Ninth and portions of paragraph Sixth of the original statement of charges, and paragraph Eighteenth of the supplemental statement of charges, on the grounds (a) that the allegations therein contained pertain to acts which occurred prior to January 1, 1964, when respondent became a Judge of the District Court of Suffolk County, and (b) that the acts are not related to respondent's conduct as a District Court Judge.

"Under the applicable provisions of the Constitution and relevant statutes...a Judge of of the District Court may be removed 'for cause' by the Appellate Division of the Supreme Court. ...

"...there is no constitutional or statutory provision which requires that the 'cause' for removal...must relate to misconduct in office, or that the wrongdoing must relate to the official duties of the judicial officer, or that it shall have occurred during the particular term which the officer was serving when the proceedings were instituted. The absence of any such limitation...leads us to the conclusion that the removing body may consider any acts of misconduct which reflect adversely upon the general character and moral fitness necessary to the proper performance of the duties of judicial office. '"Cause" is an inclusive, not a narrowly limited, term. Such "cause" may be directly associated with the Judge's work as a Judge but it is not limited to such matters...'

"In our opinion, the term 'for cause' includes any misconduct, even if committed prior to the taking of judicial office, as would disclose that the Judge's retention in office is inconsistent with the fair, proper and wholesome administration of justice. A judicial officer is nonetheless unfit to hold office and the interests of the public are nonetheless injuriously affected even though the misdeeds which portray his unfitness occurred prior to assuming such office... This principle is particularly applicable where, as here, the acts alleged to have been committed by respondent occurred while he held prior judicial office as a Justice of the Peace of the Town of Smithtown. We, therefore, reject respondent's contention, implicit in the motion before us, that a judicial officer may not be removed for any act of misconduct which occurred prior to the commencement of his term of office. ...

"...Holding, as we do, that misconduct involving moral turpitude constitutes 'cause' for removal whether it took place before or after the assumption of judicial office presently held, all the more is that true, where, as here, the alleged misconduct was committed during a term of judicial office immediately preceding the present office.

"An additional and independent ground for denying the motion flows from the basic principle that since a District Court Judge is required by law to be an attorney...any act which reflects adversely on his character and fitness to be an attorney necessarily reflects upon his character and fitness to remain in judicial office.

"Finally, we find to be without merit the contention that since the respondent was, by the vote of his constituents, deemed capable and worthy to serve as a District Court Judge, this court

does not have the power to nullify the selection of the people on the basis of a character review of his moral or ethical conduct before he assumed that office. ... At bar, as it appears that the alleged misdeeds of respondent were not known to the voters when they elected him to his present office, the claim that respondent's election closes the door to an inquiry concerning his alleged past misconduct is without substance.

"The motion should be denied, without costs."

The Federalist No. 48. (Madison)

"To the People of the State of New York:

"...It will not be denied that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating...the several classes of power as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be is the great problem to be solved. ...

"...in a representative republic, where the executive magistracy is carefully limited, both in the extent and duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions. ...

"The conclusion which I am warranted in drawing from these observations [of the usurpation of powers by the legislature of Virginia and Pennsylvania] is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands. PUBLIUS"

The Federalist No. 51. (Madison)

"To the People of the State of New York:

To what expedient, then, shall we finally resort for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution? The only

answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. ...

"...it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. ...

"It is equally evident, that the members of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices. ...

"But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. ...

"...In republican government the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches;... ."

Mill, E.W. *Liberty and law: readings in American government.* Morristown, N.J. Silver Burdett Company.

Contains excerpts from the *Federalist, Numbers 10, 16, 17, 78,* and *85.*

The Impeachment, Conviction, and Ouster of William Sulzer, 39th Governor of the State of New York.

One of the strangest and saddest examples of the probable misfiring of the system of checks and balances is that of William Sulzer. Decisively elected Governor of New York State in November, 1912, he began his term on January 1, 1913, and was impeached, convicted, and removed from office only nine months later. The case at the time exploded on the front pages of newspapers in New York State and elsewhere, for William Sulzer had been for 18 years a well-known and respected member of the U.S. House of Representatives with a reputation as an active, articulate, reform-minded man. As a Congressman, he fought hard and well for such enlightened measures as direct election of senators, the referendum, and the short ballot.

Prior to being elected to Congress, he had served as Speaker of the State Assembly. He had been a product of New York City politics, which meant at that time, getting along with the power figures in Tammany Hall. Sulzer's inclinations toward reform, openness, and independence did not make him a favorite of the Tammany leaders, although an uneasy alliance did exist since Tammany was the Democratic Party in New York City and Sulzer was a New York City Democrat. At the Democratic State Convention of 1912, the Tammany boss, Charles F. Murphy, sensing a rising upstate tide of support for the popular Sulzer as gubernatorial candidate, agreed not to stand in the way of Sulzer's nomination and to accept second place for his more loyal follower, Martin H. Glynn, publisher of the Albany *Times-Union*, who became the Democratic candidate for Lieutenent Governor. One of Sulzer's campaign issues was the direct primary. Glynn appeared to agree, although it was well known that Boss Murphy took a dim view of such reform measures. Sulzer won a sizeable majority vote in a field of six candidates for Governor. In private conversations with Sulzer, Murphy revealed his knowledge of Sulzer's precarious personal finances--large debts, mainly the result of frequent political campaigning over many years. Murphy offered, on behalf of the Democratic Party to wipe out Sulzer's debts to the tune of $100,000 and give him $1,000 a month extra living allowance while he was Governor. Sulzer refused, an act of considerable courage in view of his indebtedness and the enormous power that Murphy had in party circles.

After Sulzer had been inaugurated, he made an earnest attempt to accommodate Murphy's patronage demands and his own inclinations toward a genuine reform administration. Some Tammany backed appointments angered several of Sulzer's staunch supporters and some of his independent appointments and his investigations of corruption angered the Tammany men. Finally Murphy made a direct threat to the Governor: "Unless you do what I want you to do, I will wreck your administration." Murphy also stated to Sulzer and to his own associates that he would disgrace Sulzer as well as destroy his fledgling administration.

Unfortunately, there were instances of irregularities in Sulzer's campaign expenditures, mainly unreported contributions. Although Sulzer subsequently indicated that subordinates mishandled the accounting of his funds and that he personally did not profit from the contributions, the charge was made that he had diverted campaign funds to his personal use and had falsified campaign financial records. The Democrats controlled the Legislature; Murphy controlled most of the Democrats and more than a few of the Republicans. Lieutenent Governor Glynn, ever loyal to Murphy, was waiting in the wings only too anxious to sit in the Governor's chair. Sulzer attempted to proceed with the affairs of State and in the summer of 1913 called a special session of the Legislature to deal with his direct primary proposal. Although the Legislature in a special session may deal only with the specific issue for which it is called, according to the State Constitution, this special session took up the impeachment charges, including perjury, felony, misdemeanors and larceny, and the Assembly impeached William Sulzer by a vote of 79 to 45.

The trial was held with the Senate and nine Judges of the Court of Appeals sitting as a High Court of Impeachment. Attempts by Sulzer's defense to disqualify certain Tammany Senators failed. At least three of the Judges were under Murphy's control. History records that two of Murphy's key floor men in the impeachment proceedings were Assemblymen Alfred E. Smith and Senator Robert F. Wagner, Sr., both of whom owed their political careers to Tammany. Angry mass rallies in support of Sulzer occurred all over New York State, letters of support from fellow governors of other states poured in, but Boss Murphy worked his will. Sulzer was found guilty on three of the eight counts, and on October 17, 1913, the Court voted 43 to 12 to remove him from office. Martin H. Glynn was Governor at last. A wave of outrage echoed from one end of the State to the other and less than a month after his removal, Sulzer was elected to the Assembly once again from his New York City district.

For additional research:

Ellis, D.M., Frost, J.A., Synett, H.C., & Carman, H.T. *A history of New York State.* Ithaca. Cornell University Press. 1967.
A brief mention in chapters 29 and 37.

Forrest, J.W. & Malcolm, James. *Tammany's treason: impeachment of Governor William Sulzer.* Albany. Fort Orange Press. 1913. o.p.
The definitive blow-by-blow account, in the thunderous muckraking style of the time, replete with purple prose, poetic excerpts and excellent documentation. Forrest was a friend of Sulzer and is not an impartial observer.

Friedman, J.A. *The impeachment of Governor William Sulzer.* New York. Columbia University Press. 1938. o.p.

UNDERSTANDING IV

EXTERNAL CHECKS ON OFFICIAL COMPLIANCE WITH CONSTITUTIONAL BOUNDARIES MAY BE PROVIDED BY A NUMBER OF MEANS:

- AN INDEPENDENT JUDICIARY BRANCH ACTIVATED BY PRIVATE CITIZENS
- CITIZEN'S EXERCISE OF FREE EXPRESSION
- THE NECESSITY OF AN OFFICAL TO STAND FOR ELECTION AT REGULAR INTERVALS.

A. *Explanation of Understanding IV*

In the three mechanisms considered thus far for controlling legal officials (drawing constitutional boundaries, internal checks by like officials, checks and balances), little has been said about the role of private persons in policing official action. However, private citizens play a major role in several important mechanisms for controlling official conformity to constitutional limits. Understanding V considers three external checks on government officials, wherein private citizens are instrumental in helping to maintain constitutional principles. These same mechanisms provide citizens with a means of seeing that officials perform the day-to-day duties of office.

An independent judiciary provides an important control on officials that is operative only when private citizens take the initiative. Judicial review of legislation has been considered in Understanding III. Indepth review of the judicial surveillance function is suggested in this separate understanding for two reasons. First, the judicial check usually operates only when a private citizen puts it in motion. Second, judicial surveillance is often regarded as limited to overruling unconstitutional statutes as a part of the checks and balances function. Actually, judicial review is a much broader power and may nullify or rectify many kinds of official activity when constitutional limits are violated.

Public opinion can have an effect on checking officials. Public criticism of official disregard for basic interests of the people may persuade officials to respect such interests. The First Amendment protects free speech and "the right of the people peaceably to assemble." Thus, private persons may speak or publish criticisms of officials, and they may come together to express their dissatisfaction with officials. Such peaceful demonstration of dissatisfaction may serve as important and dramatic means of encouraging official conformity to law.

In addition there is a relationship between the effect of public opinion on officials and the ballot box. Officials who do not fulfill their duties or who disregard the limits of their constituted authority may be voted out of office.

Module 4

B. *Teaching Understanding IV*

OBJECTIVES

- The student can suggest several ways in which the citizen can bring official compliance with constitutional boundaries and can rank order these with respect to appropriateness for the situation.
- The student can devise and apply a model for detecting the citizen's failure to act, in a given case in which an official has exceeded constitutional authority.
- The student can apply a values clarification technique to the situations in which a citizen must initiate action or play a decisive role in bringing about official compliance with constitutional boundaries.

QUESTIONS TO REACH UNDERSTANDING

- Why is the role of the private citizen critical in activating the judicial check?
- Why might the independent judiciary be considered as both an important check on government power and a source of potential abuse of government power?
- Why were rights of free expression granted to citizens in our Bill of Rights?
- How might citizens or government officials abuse these rights?
- How might the right to vote be used by citizens as a method of keeping government officials within constitutional limits?
- What factors determine the effectiveness of the vote as an instrument to control officials?

Module 4

DETAILED DESCRIPTION OF STRATEGIES

1. Citizen activation of the judicial check.

   (1a) Using court cases from previous understandings and modules, identify the person who put the judicial check in motion. (This can be a small group activity.) In followup discussion, students may suggest the nonmonetary cost to the citizen of such action. A value clarification technique can be applied using the following steps:
   - definition of problem caused by official exceeding bounds of authority
   - identification of alternatives open to the citizen
   - evaluation of each alternative in the light of possible consequences to the citizen
   - free choice among the alternatives

   Through role play or a written "what if" exercise, students may work with the steps, *internalization* and *reevaluation in the light of new experiences*. The exercise would propose a similar case or experience, in which the citizen is faced with making a similar choice among alternatives. Will he stick to his original decision; that is, has the value of sacrificing certain personal benefits for the principle been internalized? Have new conditions imposed another choice?

DISCUSSION OF STRATEGIES AND RESOURCES

1. Citizen activation of the judicial check. Procedures and resources for studying the judicial check can for the most part be a review from different perspectives of the cases already considered in this module. In each case some individual has come to the judiciary with the complaint that an official has acted in a way that violates the boundaries of official action set forth in the constitution. The individual is claiming that an official has interfered with the basic interests or values of citizens by exceeding his constituted authority.

2. Relative independence of the judicial branch. A judiciary activated by private initiatives will prove ineffective if it is under the control of officials it is supposed to police. Thus, judicial independence is crucial to judicial policing of official compliance with law.

What is meant by independence? Federal judges are appointed officials and hence are not subjected to electoral review of their activity. In this sense the judiciary is independent of public influence.

The President appoints Federal judges. But the term for which he appoints them is "good behavior" which means as a practical matter until death, voluntary retirement, or impeachment. Once a Federal judge is appointed, he is essentially independent of executive influence.

The legislature has the power to remove Federal judges by impeachment. However, this procedure has been used so infrequently in American history that for practical purposes, once a Federal judge is appointed, he is independent of legislative influence.

DETAILED DESCRIPTION OF STRATEGIES

2. Relative independence of the judicial branch.

(2a) Using Article III, United States Constitution, and The Federalist, Numbers 78 and 79, have students discuss the significance of an independent judiciary and the relationship of life tenure for judges to this issue.

(2b) Assign reading on the development of the independent judiciary as preparation for further discussion. The teacher may adapt selections from William Cohen, et al, *The Bill of Rights: A Source Book*, pp. 2-17, or assign relevant passages in Leonard James, *The Supreme Court in American Life*, pp. 15-42.

(2c) The film, "Storm over the Supreme Court," traces the historical questioning of the power of the Supreme Court. Students may compare the message of the film with the concepts developed in the readings in answering these questions and others which they may prepare:

- Why is the independent judiciary important?
- How can an independent judiciary abuse the power it has?

DISCUSSION OF STRATEGIES AND RESOURCES

Many state and local governments do not place such emphasis on judicial independence. Some judges are elected, while others are appointed by the executive. Terms in office vary. There may be provision for removal by either special courts or the legislature. But in practice, even elected state judiciaries are relatively independent of political influence.

3. Citizen's role through free expression. The primary procedure suggested for reaching a part of this understanding is to use case studies of illustrations from current events that show private citizens exercising rights of free expression. Students should consider how free expression might check official violation of constitutional principles.

In discussing free expression as a check on official action, the teacher may be presented with the task of drawing a distinction between peaceful and violent uses of free expression. The primary focus of this understanding is not the dynamics of the conflict between free expression and public order, but on free expression as a mechanism for checking official misconduct. This conflict between the right to express oneself and the legitimate governmental interest in maintaining order is considered in detail in Understanding III of Module V. If the teacher wants students to analyze the limits of free speech, he should refer to these materials.

4. Citizen's role through exercise of the franchise. Procedures and resources for this understanding suggest examination of consitutional provisions that provide for periodic elections of public officials and consideration of how this may serve as a check on officials.

DETAILED DESCRIPTION OF STRATEGIES

3. Free expression may serve as an external check on official action.

   (3a) Using the First Amendment of the United States Constitution and Article I, Sections 8 and 9, of the New York State Constitution, have students suggest ways that these constitutional provisions contribute to official compliance with constitutional boundaries.

   (3b) News clippings, pictures, and cartoons related to freedom of speech may be examined with respect to how each account relates to a protest against official disregard of basic constitutional rights. In each case, the relative effectiveness of the protest technique should be discussed. Possible examples include:

   - Speeches protesting the Vietnam War as unconstitutional
   - Speeches protesting the unpropriety of certain police law enforcement techniques

   (3c) The class may view a film on the exercise of the freedom to speak. (See p. 55 for suggested films.) Have students consider the effectiveness of free expression in controlling officials.

4. A free press may serve as an external check on official action.

   (4a) Divide the class into several teams, each of which is to gather information on an

DISCUSSION OF STRATEGIES AND RESOURCES

It may not be possible to identify a specific case where an official has been voted out of office because of failure to conform to constitutional limiting principles. This is due to the practical difficulty of determining the exact reasons for an election result and the fact that the public tends to be apathetic about official deviation from such principles. Nevertheless, it may be interesting to try to identify a case where official deviation from constitutional limiting principles has cost some votes. It is realistic to suppose that this possibility helps keep some officials from disregarding the boundaries of their constituted authority and forces others to fulfill their duties more conscientiously.

"The Contribution of an Independent Judiciary to Civilization" by Learned Hand is difficult, but pertinent reading. Some students may explain the gist of Hand's thinking to the class for brief discussion. The teacher will find it useful to read the excerpt included on page 52.

Note that it is important to use some current and relevant examples in Activity 3b. The Vietnam War example will soon be relegated in student thought to historic examples, such as those included under the subtopic, Conflicting Ideologies in *American Civilization in Historic Perspective, Part I*, pages 46-98.

Students can use the *Readers Guide* and the *New York Times Index* to assist them in gathering relevant data from newspapers and magazines. As in the case of the use of free speech as a check on official action, the current and local examples are very important.

example of press protest against an official. In reporting to the class, each team should attempt to analyze the effectiveness of free press in carrying out this function. Examples may include:

- The dialogue between Vice President Agnew and the television networks (see pp. 35-44.)
- The dispute between the House of Representatives Commerce Committee and CBS over preparation and presentation of the documentary "The Selling of the Pentagon"
- A local action; for example, a series of news accounts concerning street maintenance or refuse collection

5. Peaceful protest through assembly or petition may serve as an external check on official action.

(5a) Possible individual or team investigations with respect to this check include:

- Civil rights marches and demonstrations by NAACP and SCLC, protesting nonequal protection of blacks before the law
- Marches on Washington and demonstrations against the Vietnam War protesting the fighting of a war not legally declared by Congress

Students may find useful material in *Dissent and Protest* to include in the class discussion of these topics.

The film, "Faces of Patriotism," can be used at this point. A followup values clarification procedure should then be used to assess the human cost of this technique.

(a) Have students examine provisions in the Federal and state constitutions which provide that certain officials must periodically stand for election. See p. 57. Have students consider the degree to which this external check is effective.

(b) Have students ask their parents or other adults for suggestions or collect examples from the newspaper which provide examples of the following:

- An instance in which an official's conduct violated basic constitutional principles, and therefore lost votes in the subsequent election. Discuss how the vote may serve as check on official disregard for basic limiting law.
- An instance which which a public official did not perform his legal duties and therefore may have lost votes in a subsequent election.

Discuss how the limitations of the knowlege and interest of citizens are reflected in the effectiveness of the vote as a check on officials. The teacher may find the essay entitled "Government" in James Mill's *Essays* of interest.

Module 4

RESOURCES*

Summers, R.S., Campbell, A.B., & Hubbard, G.F. *American legal system.* Unit IV - "Constitutional protection of basic social values." Lexington, Mass. Ginn & Co. 1973.

Hand, Learned. "The Contribution of an Independent Judiciary to Civilization," reproduced in Murphy, W.F. & Pritchett, C.H., *Courts, judges and politics: an introduction to the judicial process.* New York. Random House. 1961. pp. 688-690. Reprinted by permission of the Massachusetts Supreme Judicial Court.

The quoted material is removed to conform with copyright laws.

United States Constitution, Article III.

Hamilton, Alexander. *Federalist No. 78* and *No. 79*. pp. 226-232; 234.

"THE FEDERALIST NO. 78 (HAMILTON)

"To the People of the State of New York:

"We proceed now to an examination of the judiciary department of the proposed government. ...

"According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices *during good behavior*... . The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. ...

"...The judiciary...has no influence over either the sword or the purse, no direction either of the strength or the wealth of the society; and can take no active resolution whatever. ...

"...It is rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. ...

"Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental. ...

"If,...the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

"This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves; and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. ...

"But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they meditate to qualify their attempts. ...

"That inflexible and uniform adherence to the rights of the Constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. ..."

"THE FEDERALIST NO. 79

"To the People of the State of New York:

"Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. ... In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in practice the complete separation of the judicial from the legislative power in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter. ...

"This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence... ."

Module 4

Student Text Materials

Cohen, William, et al. *The Bill of Rights: a source book.* New York. Benziger Brothers. 1968.

Part One, pp. 2-17, contains one section on judicial review and a second on the 14th amendment and federalism.

James, L.F. *The Supreme Court in American life.* Chicago. Scott, Foresman. 1964. pp. 15-42. (Problems in American History Series.)

Problems One through Three deal with the origins of the Supreme Court, customs and procedures of the Court, and judicial review.

The Supreme Court. Columbus. American Education Publications. AEP Unit Books. 1972.

Considers the role of the Court, how justices go about interpreting the Constitution, the importance of precedent, decisions the Court is powerless to make, decisions it attempts to avoid, and checks on the Court's actions.

Film

"Storm over the Supreme Court." Carousel Films. 52 min.

Traces historical questioning power of Supreme Court.

1. Free expression as an external check on official action.

United States Constitution, Amendment I.

New York State Constitution, Article I, Sections 8 and 9. (Use New York State Redbook or Legislative Manual.)

Films

"The Bill of Rights in Action Film Series: Freedom of Speech." Los Angeles. Bailey Film Associates. 22 min. Bernard Wilets, Series Director.

Fairly detailed examination of a value conflict between free speech and public security. Shows man speaking in public on a highly emotional issue. After arousing the crowd the man is

arrested and later convicted for disturbing the peace. The conviction is appealed and two lawyers argue the case before a judge. The film presentation is open-ended with the decision left to the viewer. A drawback of the film is that the initial action is dissipated in talk. See Rationale, p. 15 concerning availability on video tape in New York State schools.

"Bill of Rights/A Series: Speech and Protest." Los Angeles. Churchill Films. 22 min.

Focuses on two incidents on which the right to speak or the right to assemble is questioned. One situation involves a controversial classroom discussion and raises the question of a teacher's right to academic freedom. The second situation presents alternate endings to an antiwar demonstration; in one version, police speedily break up the demonstration while in the other version it gets out of hand. The film leaves to the viewer to determine the balance between rights of protestors against duties of police.

"Freedom to Speak: The Feiner Case." Our Living Bill of Rights Series. Encyclopedia Britannica Films. See Rationale, p. 15, concerning availability on video tape in New York State schools.

Filmstrips

"Freedom of Speech." Our Living Bill of Rights Series. Warren Schloat.

Pamphlets

Starr, Isador. *The Feiner case.*

2. A free press as an external check on official action.

Films

"Free Press versus Fair Trial by Jury." Our Living Bill of Rights Series. Encyclopedia Britannica Films.

"Mightier Than the Sword: Zenger and Freedom of the Press." Teaching Film Custodians.

Pamphlets and Texts

Oregon State Bar Association and Portland Public Schools. *Free press - fair trial.* Liberty and the Law Series.

Module 4

Mehlinger, Howard and Patrick, John. *American political behavior.* Chapter 19 - "Representatives of the Mass Media."

3. Peaceful protest as an external check on official action.

Films

"The Faces of Patriotism." Hastings-on-Hudson. Wombat Productions. 30 min. color.

Texts and Readings

Mehlinger, Howard and Patrick, John. *American political behavior.* Chapter I - "The Pleasant Valley Case."

Barker, L.J. and Barker, T.W. *Freedoms, courts, politics: studies in civil liberties.* Englewood Cliffs. Prentice-Hall. 1965.

Deals with the dynamics of civil liberties and explores six problem areas each centering on one or two important court cases. Major topics are related to religion in public schools (Engel v. Vitale); problems of free speech (Feiner v. New York); racial problems (Brown v. Board of Education); and rights of the accused (Mapp v. Ohio and Gideon v. Wainwright).

Dissent and Protest. Columbus. AEP Unit Books. 1970.

United States Constitution. Portions which provide that certain officials must periodically stand for election: Article I, Section 2 (Representatives); Amendment XVII (Senators); Article II (President).

New York State Constitution.

Mill, James. *Essays on government, jurisprudence, liberty of the press and law of nations.* New York. A.M. Kelley Publishers. 1967.

Originally published in 1825 in *The Supplement to the Encyclopedia Britannica.* See "Government," pp. 1-32.

Mehlinger and Patrick: *American political behavior* has many examples and a very well developed conceptual scheme for developing these ideas.

UNDERSTANDING V

THE IMPORTANCE OF THE ROLE OF THE PRIVATE CITIZEN IN PROVIDING CHECKS ON OFFICIALS REQUIRES THAT CITIZENS BE KNOWLEDGEABLE ABOUT FUNDAMENTAL RIGHTS AND CONCERNED ABOUT PROTECTING THOSE RIGHTS.

A. *Explanation of Understanding V*

A plan for external checks on official deviation from constitutional limiting laws by private citizens presupposes an informed segment of the public that values relevant principles and is willing to protest when it sees such principles actually or potentially infringed. The maintenance of a publicly supported education system provides a principal means of perpetuating the values that underlie the constitutional limiting principles of our system.

B. *Teaching Understanding V*

OBJECTIVES

- The student will identify the relationship between protection of fundamental rights under a constitution and the education of the citizenry, and will suggest ways to make that relationship more effective.

QUESTIONS TO REACH UNDERSTANDING

- Why is education important in a democracy?
- Why does education not always produce citizens who are concerned about the limits of official power and who are willing to act to check such power when necessary?

DETAILED DESCRIPTION OF STRATEGIES

(a) Have students demonstrate the meaning of this quotation from Judge Learned Hand by collecting news items or historical episodes which illustrate it.

> "Liberty lies in the hearts of men and women. When it dies there no constitution, no courts, no law can save it."

In small group, then fishbowl discussion, students may then explore the causes of their illustrations, including the relationship of education to the "death of liberty" in someone's heart.

(b) Have students consider (1) the reasons for the sections of Education Law on pages 60-61 and (2) the successes and failures of the public education system to prepare an informed citizenry that will value and protect the limiting principles of constitutional law.

DISCUSSION OF STRATEGIES AND RESOURCES

The first condition for efforts by private citizens to be an effective check on officials is that the members of the public value the underlying principle of constitutional government. Part of the job of education is the fostering of such public beliefs. From this perspective, students may be interested in analyzing the reasons why the State of New York requires them to study about their government and Constitution. Selected writings from Jefferson on on the importance of free education to a democratic society may be of interest. A final inquiry for this module might be: What reasons would justify the study of materials such as these in high school social studies?

Selections from the writings of Thomas Jefferson on the vital importance of education to a democracy would be relevant to this discussion. Gordon C. Lee's *Crusade Against Ignorance: Thomas Jefferson on Education* as well as most other collections of Jefferson's writings would include examples. (See also Understanding I, Module V, p. 15).

In discussing the success or failure of the education system to prepare an informed citizenry, the strategies and materials in *American Civilization In Historic Perspective, Part II: Education*, pp. 11-17, can be used or adapted. In addition, the report of the Glens Falls conference, pp. 54-62 in the same publication, might be useful.

RESOURCES*

Quotation from Judge Learned Hand, "The Contribution of an Independent Judiciary to Civilization." (See p. 52).

Lee, G.C., ed. *Crusade against ignorance: Thomas Jefferson on education.* New York. Teachers College, Columbia University. 1961.

McKinney's Consolidated Laws of New York. Vol. 16. "Education Law."

Section 801. Courses of instruction in patriotism and citizenship and in certain historic documents

"2. The regents shall prescribe courses of instruction in the history, meaning, significance and effect of the provisions of the constitution of the United States, the amendments thereto, the declaration of independence, the constitution of the state of New York and the admendments thereto, to be maintained and followed in all of the schools of the state. The boards of education and trustees of the several cities and school districts of the state shall require instruction to be given in such courses, by the teachers employed in the schools therein. All pupils attending such schools, in the eighth and higher grades, shall attend upon such instruction. ...

"3. The regents shall determine the subjects to be included in such courses of instruction in patriotism and citizenship and in the history, meaning, significance and effect of the provisions of the constitution of the United States, the amendments thereto, the declaration of independence, the constitution of the state of New York and the amendments thereto, and the period of instruction in each of the grades in such subjects....

"4. The regents shall designate a week during each year and prescribe a uniform course of exercises in the public schools of the state suitable for pupils of various ages to instill into the minds of such pupils the purpose, meaning and importance of the bill of rights articles in the federal and state constitutions. Such exercises shall be in addition to any prescribed courses of study in the schools.

*Direct quotations from statutes are indicated by the use of quotation marks. Other statements are summaries or paraphrases of the statute listed.

Section 3204. Instruction required

"3. Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for instruction in at least the twelve common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York state and science.

"(2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declaration of Independence and established by the constitution of the United States.

"(3) The courses of study beyond the first eight years of full time public day schools may provide a program for a course 'communism and its methods and its destructive effects'."